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FILED ELECTRONICALLY

August 23rd, 2010

Mr. Robert A. Morin
Secretary General,
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Re: Application No. 2010-0550-5, Application by Shaw Communications Inc. (Shaw), on behalf of CanWest Global Communications Corp. (Canwest Global) and its operating subsidiaries/licensees, for authority to transfer the effective control of Canwest Global's broadcasting entities to Shaw, through a wholly-owned subsidiary of Shaw known as 7316712 Canada Inc. (7316712 Canada).

Dear Mr. Morin,

1. The DOCUMENTARY ORGANIZATION OF CANADA | L'ASSOCIATION DES DOCUMENTARISTES DU CANADA (DOC) would like to thank the Commission for the opportunity to provide these **opposing comments** regarding the aforementioned notice of consultation.

2. DOC is the collective voice of independent documentary filmmakers across Canada. DOC is a national non-profit arts service association representing over 800 directors, producers and craftspeople in the documentary community, from all provinces and regions of our nation. DOC advocates on behalf of its members to foster an environment conducive to documentary production and strives to strengthen the sector within the broader film production industry.

The Application:

3. Shaw Communications Inc. (Shaw) has applied to transfer the effective control of Canwest Global Communication Corporation's (Canwest) broadcasting entities to Shaw, which will consist of:

- Canwest's broadcasting undertakings' assets;
- 100 common shares of Canwest Global Broadcasting Inc.;
- 1,000 units of TVtropolis General Partnership (66.67%);
- 490,000 units of Men TV General Partnership (49%);
- 50 units of Mystery Partnership (50%);
- 1 common share of Fox Sports World Canada Holdco Inc.; and
- 99.9% partnership interest in Fox Sports World Canada Partnership

4. Shaw argues that its application is in the best interests of Canadians and fulfills many aspects of the Broadcasting Act. Its purchase will repatriate an important Canadian media conglomerate. Shaw maintains that in its hands, Canwest's

assets will be better exploited in a cross-platform digital media age.

5. In BNC 2010-498, the Commission has highlighted numerous issues to discuss regarding Shaw's application, including: ownership, and the value of the transaction of the benefits package. In particular, the Commission is interested in discussing:

- the potential anti-competitive behaviour that would arise from Shaw's acquisition of Canwest
- the incrementality, the acceptability, and proposals of any benefits package found to be unacceptable to the Commission.

6. In this intervention, DOC would like to comment on the latter (Shaw's benefits package proposal). We would also like to comment on what is absent from Shaw's application: support for the independent production community and the broadcasting community in general.

DOC's Comments:

7. Shaw has asked the Commission to continue its practice of evaluating benefits packages on a case by case basis, then consider the unique circumstances of its acquisition. Initially, Shaw calculated its benefits package at only 1% of its total value. It claimed that paying the debts of Canwest to Goldman Sachs should not be considered part of the transaction, because there was no change in ownership through this payment. The first benefits package of \$23 million would be spent on converting the transmitters of non-mandatory markets to digital transmitters.

8. However, in response to the Commission's initial comments about Shaw's benefits package, Shaw expanded its benefits package to be approximately 10% of the total transaction. On top of the previous benefits proposed, Shaw included:

- the continuance of the Alliance Atlantis Benefits package: approximate value \$95 million
- a category 7 programming initiative that would fund the development, production, and promotion of programs of this category: \$24 million
- a new media initiative that would support the creation of interactive digital media content as defined by the CMF: \$18 million
- a local news programming initiative that would launch 4 local morning news shows in Global TV's major markets: \$ 43 million

9. After reviewing Shaw's applications and proposed benefits package, DOC must strongly oppose Shaw's application to acquire Canwest's television assets. The tangible benefits proposed to the broadcasting community do not warrant the increased concentration of ownership in the Canadian market. DOC argues that the benefits package offered by Shaw does not adequately distribute the funds across the broadcasting sector to its betterment. In particular, it is unclear whether any benefits actually flow to the independent television production community.

10. DOC takes issue with a number of aspects of the benefits proposal, namely:
- It includes unfulfilled benefits
 - It does not fully exploit the documentary assets that are being acquired
 - It does not flow predominately to independent producers
 - It sets a bad precedent for the application of benefits policy

Unfulfilled benefits are not benefits

11. In BPN 1993-68, the Commission makes it expressly clear that any unfulfilled benefits packages are part of the Conditions of Licence of the services being acquired, and must be fulfilled by the purchaser. The public notice also states that any unfulfilled benefits cannot be considered as benefits in the proposed package of the acquisition. Shaw has done exactly that. It has included the Alliance Atlantis (AA) benefits package as part of its proposed benefits package.

12. DOC does value the AA benefits package, especially the 3 documentary initiatives contained within it, but Shaw should not be able to claim a condition of licence as part of its benefits package. By including the AA benefits package in the proposal, the total amount of benefits from the transaction is reduced and fewer tangible benefits are available to the broadcasting community.

13. In its application, Shaw said it would acquire all of the services with their present conditions of licence. DOC understands that to mean that Shaw will fulfil all the conditions of licence including the unfulfilled benefits. Shaw must redesign its benefits package to account for the missing \$95 million it earmarked for the unfulfilled benefits, and also maintain the AA benefits.

Lack of support for documentary production in benefits package

14. Benefits policy states that it is the responsibility of the applicant to construct the best possible benefits package. Given Canwest's extensive documentary assets, the best possible benefits package would try to exploit Canwest's documentary assets. This would benefit both Shaw and the independent production community. Shaw would be able to maintain the popularity of its documentary assets and independent producers would be able to create more programming. Presently, the benefits package does not contain any tangible benefits for documentary production.¹

15. Canwest's documentary commissioning department is one of Canada's largest, with a network of many services. Food Network, HGTV, History, IFC, Mystery, National Geographic, Slice and Viva are among the specialty service of Canwest that commission documentaries. Combined with Global TV, Canwest's documentary assets are considerable.

¹ As argued above, the AA benefits do not count for they are part of the conditions of licence of the Alliance Atlantis stations. Consequently, the three funds for documentary production should not be considered as part of Shaw benefits package.

16. Canwest's documentaries are also popular with audiences. According to the CMF audience reports, 7 of the top 25 viewed programs were documentaries; all of which had audiences larger than 500,000. Global TV's broadcast of *Aftermath* had the 9th highest AMA in 2008-2009 of English CMF programs with an AMA of 772,000. When *Aftermath* aired on conventional TV, it surpassed the ratings of CBC's top rated documentaries.

17. In the specialty market the top 3 programs overall were documentaries from History Channel: a re-broadcast of *Aftermath*, *Death or Canada*, and *the Devil's Bargain*, whose ratings were 477,000, 343,000, and 315,000, respectively. Of the top 10 viewed programs, 7 were documentaries; all with ratings around 300,000. 5 of those documentaries were broadcast on History Channel. Of the top 25 viewed programs, 15 were documentaries, 9 of them broadcast on History Channel.

18. Canwest's documentary department also has access to the largest CMF envelope of all the broadcasters: \$6.5 million. In fact, Canwest's documentary envelope is more than a third of the total English documentary envelope: \$15.5 million. By exploiting its documentary assets, Shaw triggers more funding for documentary programming.

19. Considering that Shaw is purchasing Canada's largest, most popular documentary assets, which also have access to the largest CMF envelope, a revised proposal should include the exploitation of these programming resources. Documentary benefits would allow for Shaw to finance under-supported programming according to the new CRTC television regulations, and also take advantage of its documentary assets.

20. If the Commission asks Shaw to redesign its benefits package, DOC would be happy to provide input on what particular initiatives could be included in the amended benefits package. These benefits would allow for Shaw to exploit its documentary assets and also provide tangible benefits to the independent documentary community.

The benefits package does not predominately flow to independent producers

21. As stated in benefits policy, and added as a point of discussion by the Commission, applicants must demonstrate that expenditures proposed as tangible benefits flow predominantly to third parties, such as independent producers. Shaw's benefits package does not meet this requirement. In fact, it is not confirmed whether any benefits at all flow to 3rd parties.²

22. The majority of the tangible benefits clearly do not flow to 3rd parties. Of the

² As argued above, the AA benefits do not count for they are part of the conditions of licence of the Alliance Atlantis stations. Consequently, none of the independent production initiatives included in the AA benefits count as being part of the present benefits.

\$108 million in benefits outlined in Shaw's benefits proposal, 66% of all of the benefits (\$66 million) go directly to funding Shaw's own news production or the improvement of its broadcasting infrastructure.

- \$ 23 million are earmarked for the DTV transition of non-mandatory markets
- \$ 43 million are earmarked for the local morning news initiative

23. The remaining 34% of the benefits (\$42 million) go towards the category 7 programming initiative and new media initiative.

- \$24 million are earmarked for the Category 7 programming initiative
- \$18 million are earmarked for the new media component initiative.

24. Although it may seem as if the remaining 34% in benefits flows to the independent production community, the proposal does not indicate explicitly whether independent producers can apply to these funds or whether they are intended for affiliate and in-house production. Consequently, all 100% of the benefits package could flow directly to Shaw.

25. DOC would like Shaw to clarify whether the \$42 million in benefits earmarked for Category 7 programming and new media components is intended for independent production, affiliate production, in-house production, or all of three kinds, and what amounts are intended for each category. If the benefits proposal was more transparent regarding Shaw's intentions for the dispersal of these funds it would be easier for the production community to evaluate the benefits proposal.

26. Given that the predominance of benefits do not clearly flow to 3rd party sources, DOC questions the merit of Shaw's benefits proposal. The benefits could be spent internally and do not expressly provide any tangible support for the independent production community.

Shaw's Benefits Benefit Shaw, Not the Broadcasting Community

27. For all of the reasons stated above, DOC cannot support Shaw's benefits proposal. We recommend that the Commission deem Shaw's benefits package unacceptable, and request that Shaw redesign its benefits package so that it complies with benefits policy. In particular, we recommend that Shaw:

- remove the AA benefits package from the benefits proposal, which would create \$95 million unallocated benefits monies
- recognize that according to benefits policy Shaw is obligated to fulfill the AA benefits separately
- consider creating benefits for independent documentary production using a portion of the \$95M unallocated benefits monies
- create social benefits that flow to other 3rd parties such as universities, professional development programs and media literacy programs
- clarify the intended recipients of its on-screen benefits

Canwest and Corus: Clarifying the Corporate Separation

28. In various new reports, Shaw stated that it intended to operate Canwest as an entirely separate media company from Corus Entertainment. In its application, Shaw does not clarify how it intends to do so. Because of the size of the acquisition, and the market power Shaw would have following the acquisition, DOC considers clarification on this matter to be very important information for the independent production community.

29. Corus and Canwest have very different attitudes toward independent production. Canwest's documentary department almost exclusively commissions its programming from independent producers, whereas Corus has gone on the record with its desire to eliminate independent production quotas all together.

30. In its application, Shaw is not explicit about how it intends to operate both television groups. Because of its attitudes regarding independent production expressed through Corus during various policy hearings, DOC is very concerned about the impact of the acquisition on independent production in Canada. Although there are safeguards protecting the independent production community in the new television regulations, a global shift in production philosophy to include more in-house production at Canwest would impact the stability of the independent documentary production community.

31. DOC would like Shaw to clarify how it intends to operate both corporations separately given the differing philosophies of Corus and Canwest toward independent production. Without such clarification, DOC and the production community are unable to fully assess the potential impact of the acquisition on the independent production community. Consequently, DOC considers the application incomplete.

Shaw's disregard for benefits policy

32. What is very troublesome about Shaw's benefits package is the precedent it sets for future broadcasting acquisitions. Benefits policy should be flexible and should be applied on a case by case basis. However, throughout Shaw's application, many of its proposals and arguments are deliberate attempts to ignore benefits policy and not fulfil the social purpose of benefits policy.

33. In its application, Shaw attempts to demonstrate that it requires regulatory flexibility and consequently should not actually have to pay significant benefits as a result of its acquisition. Citing Channel Zero's acquisition of CHCH, and the former employees of CHEK's acquisition of CHEK, Shaw believes that, as the Commission decided for these stations, it too should not have to pay substantial benefits. It appeals to the Commission to treat its acquisition in light of these cases.

34. The difference between the transactions is obvious: CHCH and CHEK were

sold at fire-sale prices to small independent corporations, while Shaw's acquisition of Canwest is a multi-billion dollar transaction between two of Canada's largest media conglomerates. Shaw's acquisition of Canwest would result in a much greater consolidation of the market and a reduction of the diversity of voices of the Canadian media environment. Benefits are considered an offset of this increase in market concentration. The benefits flowing from the CHCH and CHEK purchases are minuscule compared the hundreds of millions of dollars that would result from the Shaw purchase. DOC considers these two small transactions to be in no way comparable to Shaw's acquisition of Canwest and believes the flexibility applied to them should not be considered for Shaw's application.

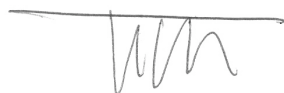
35. Although Shaw altered its application to increase the size of its benefits package because of the comments of the Commission, it must be noted that Shaw initially calculated the value of the transaction inaccurately. Shaw did not include Canwest's debt owing to Goldman Sachs in its calculation of the total transactional value; the total value of the transaction shifted from approximately \$2 billion to \$506 million. The result was that the benefits package was calculated to be 1% of the actual total transaction value of the purchase, rather than 10%. It is not uncommon for applicants to miscalculate the value of the transaction and then be required to recalculate their benefits packages, but this assessment of the total value enormously reduced the value of the benefits package.

Conclusion:

37. Shaw's attempts to draw on the CHCH and CHEK benefits decisions for flexibility, its miscalculation of the value of the transaction, and its inclusion of the AA benefits in the Canwest benefits package demonstrate that Shaw disregards benefits policy and its aim. DOC recommends that the Commission be vigilant in its application of the benefits test and recognize that Shaw has both ignored the spirit and the word of benefits policy.

38. DOC would like to thank the Commission for this opportunity to comment on this application. This acquisition has far reaching effects for the documentary sector, independent producers, and many other players in the broadcasting community. We urge the Commission to consider our opposing comments and criticisms when evaluating this transaction.

Sincerely,



John Christou, Chair
c.c.: Cynthia Rathwell , Shaw Communciations Inc. (via email:
Cynthia.rathwell@shawdirect.ca)

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